No. 93-

Supreme Court, U.S.
FILED
MAR 29 1993
OFFICE OF THE CLERK

In The

SUPREME COURT OF THE UNITED STATES

March term, 1993

JO A BOOKER,

Petitioner,

vs.

MERIT SYSTEMS PROTECTION BOARD, et al.,
UNITED STATES POSTAL SERVICE

Respondents,

Petition for Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

PETITION FOR WRIT OF CERTIORARI

JO A. BOOKER
Petitioner Pro Se
9435 DALE GLADE DRIVE
DALLAS, TX 75217-2542
(214) 309-0095

80 pp

QUESTIONS PRESENTED FOR REVIEW

I. The basic question that this case presents is whether Congress intended to prevent a Petitioner (federal employee for the United States Postal Service) from protection as be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, promised in the "Whistleblower Protection Act of 1989, 5 USC 1201?

II. Can the United States Merit Systems Protection Board and/or United States Special Counsel or the United States Postal Service ignore the burden of proof in findings that the Petitioner have suffered adverse consequences as a result of prohibited personnel practices as a reprisal for whistleblowing, while employed by United States Postal Service?

III. Did the United States Court of Appeals for the Federal Circuit violate the

Due Process Clause of the Fifth Amendment to the United States Constitution, Federal Appellate Rule 40, and its own Internal Operating Procedures, by accepting because of the lack of jurisdiction for the Merit Systems Protection Board and the Office of Special Counsel, primary role to protect the Petitioner (a federal employee) from reprisal without complying with the specific mandatory requirements of the statue?

IV. Did the United States Court Appeals for the Federal Circuit, violate the Due Process Clause of the Fifth Amendment to the United States Constitution, Federal Appellate Rule 40, and its own Internal Operating Procedures, by not acting within the law after the becoming principals that are expressed for the first time in court, a question or problem of the petitioner's allegation, with a decision becoming a precedent decision?

LIST OF PARTIES

A. The following are entities interested in the outcome of this case:

The parties to the proceedings below were the petitioner Jo A Booker, and the respondent United States Merit Systems Protection Board and/or United States Office of Special Counsel and United States Postal Service. The petitioner has requested appeals and judicial reviews in this matter without action respecting compliance under the "Whistleblower Protection Act of 1989." The prohibited personnel actions of reprisal has caused the job injury condition to worsen with additional stress and strain on the Petitioner's recovery.

Petitioner, Jo A Booker, injured Mail Handler, has two teenage sons. The sons has a interest in this outcome of this litigation.

B. The following are names of opposing law firms and/or pro se in this case:

Petitioner pro se of record, Jo A Booker, 9435 Dale Glade Drive, Dallas, TX 75217-2542.

Counsel for Respondent, are Mary L. Jennings, Acting General Counsel; Martha B. Schneider, Assistant General Counsel and Anita Marshall, Attorney, United States Merit Systems Protection Board, 1120 Vermont Avenue N.W., Washington, D.C. 20419.

Counsel for Respondent, is Ralph B. Eddy, Assistant Special Counsel, United States Counsel of Special Counsel, 1730 M Street, N.W., Suite 300, Washington, D.C. 20036-4505.

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I. THE RESPONDENT PETITION FOR REVIEW OF PERSONNEL ACTIONS OF REPRISAL ALLEGEDLY BASED ON WHISTLEBLOWING,RESPONDENT A FEDERAL EMPLOYEE HAS INDIVIDUAL RIGHTS FOR INVESTIGATION AND PROTECTION FROM REPRISAL BY UNITED STATES MERIT SYSTEM PROTECTION BOARD AND/OR

OFFICE OF SPECIAL COUNSEL, WITH TRANSMITTAL OF INFORMATION TO CONGRESS IN THE WHISTLEBLOWER PROTECTION ACT OF 1989.

A. The United States Court of Appeals for the Federal Circuit Decision, United States Merit System Protection Board and/or Office of Special Counsel Decision is in Direct Conflict with in 5 USC 1201 of the Whistleblower Protection Act of 1989, by not making the agency actions reviewable by statue and final agency action.

B. The Congress finds that a Federal employees (including the United States Postal Service federal employees) are protected under the Whistleblower Protection Act of 1989, with findings and purpose that it is established the Merit System Protection Board and/or the Office of Special Counsel to protect whistleblowers from reprisal. 5 USC 1201 Section 2

C. The Special Counsel is in Direct Conflict with in 5 USC 1214 (a)(1)(A) (B)(i)(ii), by after receiving allegations of reprisal which lead to the prohibited personnel practice from the agency (United States Postal Service) but

did not investigate the allegation to extent necessary to determine whether there are reasonable grounds to believe that a prohibited personnel practice has occurred.

THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT VIOLATED THE DUE PROCESS RIGHTS OF THE PETITIONER BY GRANTING THE COUNSELS LACK OF JURISDICTION FOR APPEAL RIGHTS AS TO THE FEDERAL EMPLOYEE TO BE HEARD 8

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OPINIONS BELOW

This case arises out of Initial Decision of this whistleblower case was under the "Civil Service Reform Act of 1978, until an Act to amend title 5, United States Code, to strengthen the protection available to Federal employees against prohibited personnel practices, and for other purposes."

Initial Complaint and Summary Investigation to the Hotline-Whistleblower, in 1982. Control Number H-82-0365, per B.N. Berger. (Appendix A)

The Initial Decision of Administrative Judge Walter Orr, of the United States of America Merit Systems Protection Board Dallas Regional Office was rendered on July 25, 1991, and is docket on at DA-34439110596 (1991). (Appendix B)

On August 20, 1991, the Petitioner, Jo A. Booker, Federal Postal Service employee, filed a Petition for Review for judicial review of

the Board (US Merit Systems Protection Board) for an opportunity to respond to Administrative Judge Walter Orr's initial decision. (Appendix C)

Request for Appeal, June 20, 1992, from the Petitioner. (Appendix D)

On September 10, 1992, Petitioner submitted a letter of inquiry to the OIG Hotline-Whistleblower, whereas the inquiry was forwarded to the U.S. Office of Special Counsel. November 10, 1992, Asst Special Counsel Ralph B. Eddy, responded stating the Civil Service Reform Act was not applicable in my matter. (Appendix E)

Under Case No. 92-3402, an Informal Brief of Petitioner was submitted to the Petitioner for completion and returned to the United States Court of Appeals for the Federal Circuit. (Appendix F)

The Decision and Order of Mayer,

Clevenger and Schall, Circuit Judges this case was rendered on December 29, 1992, and is published at United States Court of Appeals for the Federal Circuit 92-3402 (1992). (Appendix G)

A Judgement was Affirmed having been heard and considered by the court (United States Court of Appeals for the Federal Circuit, on January 19, 1993. (Appendix H)

STATEMENT OF JURISDICTION

The United States Court of Appeals for the Federal Circuit entered its judgment on December 29, 1992. Thereafter, the United States Court of Appeals for the denied Petitioner's Request for a Appeal on June 20, 1992. This Petition for Writ of Certiorari was filed within 90 days of final decision of December 29, 1992, as required by 28 U.S.C. Section 2101 (c) and Supreme Court Rules 13.1

and 13.4. Jurisdiction is proper under 5 U.S. C. 2302 (b)(8) or (b)(9) has applicable to this disclosure describe. The Board has jurisdiction over the appeal for burden of proof the Petitioner is a federal employee as findings and purpose in 5 U.S.C. Section 2.

STATUES INVOLVED

5 USC 1201 Section 1, which reads:

This Act may be cited as the "Whistleblower Protection Act of 1989".

Section 2

(a) Findings - The Congress finds that

(1) Federal employees who make disclosures described in section 2302(b)(8) of title 5, United States Code, serve the public interest by assisting in the elimination of fraud, waste, abuse, and unnecessary

Government expenditures;

(2) protecting employees who disclose Government illegality, waste, and corruption is a major step toward a more effective civil service; and

(3) in passing the Civil Service Reform Act of 1978, Congress established the Office of Special Counsel to protect whistleblowers (those individuals who make disclosures described in such section 2302(b)(8) from reprisal.

(b) (1) mandating that employees should not suffer adverse consequences as a result of prohibited personnel practices; and

(A) that the primary role of the Office of Special Counsel is to protect employees, especially

whistleblowers, from prohibited personnel practices;

(B) that the Office of Special Counsel shall act in the interest of employees who seek assistance from the Office of Special Counsel; and

(C) that while disciplining those who commit prohibited personnel practices may be used as a means by which to help accomplish that goals, the protection of individuals who are the subject of prohibited personnel practices remains the paramount consideration.

5 U.S.C. 702, which reads:

RIGHT OF REVIEW. A person suffering legal wrong because of agency actions, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review

thereof.

5 U.S.C. 1212, which reads:

Powers and functions of the Office of Special Counsel

(a) The Office of Special Counsel shall,

(1) in accordance with section 1214(a) and other applicable provisions of this subchapter, protect employees, former employees, and applicable for employment from prohibited personnel practices;

(2) receive and investigate allegations of prohibited personnel practices, and, where appropriate -

(A) bring petitions for stays, and petitions for corrective action, under section 1214; and

(B) file a complaint or make recommendations for disciplinary action under section 1215;

(5) investigate and, where appropriate, bring actions jurisdiction of the Office of Special Counsel (as referred to in section 1216).

STATEMENT OF THE CASE

This case arises out of a whistleblower reprisal claim brought under the Civil Service Reform Act of 1978 and Whistleblower Protection Act of 1989. It has already been the subject of United States Court of Appeal for the Federal Circuit in a recent decision in Jo A. Booker v. United States Merit System Protection Board, et al., (1992). The Court's erroneous decision with respect to Section 2 (b)(1)(2)(A)(B)(C)., see Appendix G on a petition for review of a final decision

of Petitioner Jo A Booker. 5 U.S.C. Subchapter III, (g)(1). Petitioner's thirteen years lengthy matter has caused a great hardship on her and her two son's livelihood, although, this person was entitled to compensation and settlement, under the provision of FECA (Federal Employment Compensation Act), which was delayed several complaints were filed. A whislteblower number was assigned to Petitioner. (APPENDIX A)

Petitioner, a permanent injured mail handler, Level 4 with the agency's (United States Postal Service) Dallas office, sustained a upper back injury in 1980 that caused repeated absences from work over the several months. Having exhausted both accumulated annual and sick leave, petitioner was terminated to be absent without leave (AWOL) effected April 28, 1981. Petitioner filed her complaint, which was investigated 29

U.S.C. 655 (c)(14). Because her injury was work-related, petitioner was instructed by the United Department of Labor to submit again another CA-1, a compensation claim with the OWCP (Office of Workers' Compensation Program.) The claim was excepted in 1984, but due to the termination (April,1981), after, the petitioner had been released from the acting physician then sought other employment. Due to the agency refusing to rehire the petitioner, the Labor Department approved a loss of wage earning capacity based on petitioner's actual earnings from the current employment (Dallas Police Department as a Police Telephone Operator) 29 U.S.C. 666(d). Those benefits continued from 1983 to 1990, until the Postal Service reemployed the petitioner, September 22, 1990. During an reemployment interview, approximately ten years later (September, 1990) with the

agency's compensation specialist (Darla Farris-Love), the petitioner was tactfully approached by the compensation specialist with reprisal statements, regarding the prohibited personnel practices complaints filed regarding petitioner's termination in April, 1981, which caused the lengthy investigation. The compensation specialist instructed petitioner how uncomfortable she was going to make it for her and how much control on any decision making

for petitioner's career in the Postal Service. Petitioner had to file several complaints regarding prohibited personnel practices, eg. agency's EEO for the reprisal, supervisors refusing medical attention submitted by the (OWCP) approved physician, supervisor putting petitioner's off days to Tuesday/Wednesday although the seniority time was eleven years, and less seniority persons had better days

off, etc. Due to petitioner's limited modified job status, the modified job offer aggravated the injured worker back and additional medical problems. Petitioner was then put in a work harding program and put back into a OWCP status. The occupational program was not successful, therefore, effective October, 1992, a vocational program was assigned to the petitioner. Due to the delayed compensation and other actions in this job placement matter caused the petitioner's other subsequently medical complications. Upon a request (June, 1992) from the agency (United States Postal Service), their interest is that the injured petitioner be hired within another part of the Federal Government or a Private Industry.

The petitioner was never offered the appropriate plan under the Individual's with Disabilities Education Act 20, as provision 5

U.S.C. 1400 et seq.

Initial issues presented to the Court for having complained to the inspector general for the prohibited personnel practices in violation of 5 U.S.C. 2302 (b)(1)(D)(b)(9) by discriminating against petitioner because of her injuries, then reprisal for her complaints to the inspector general, which lead to a whistleblower complaint. Also the fact the Merit Systems Protection Board and/or Special Counsel, without referral of this case to a Special Panel or Commission in violation of 5 U.S.C. 7702(d), 5 U.S.C. 1214, 1215, and 1216, but this legal actions has been delayed as to resolve this matter.

In an initial decision, the administrative judge found that the petitioner's claims of reprisal and discrimination were not independent sources of jurisdiction. Appendix (B)

REASONS FOR ISSUING A WRIT OF CERTIORARI

The Petitioner submit that there are special and important reason for granting certiorari on the issues presented in this case. The "Whistleblower Protection Act of 1989" and the "Civil Service Reform Act of 1978, affects many Postal Office (all federal) employees across the country. Due, to the protection that these Acts which Congress finds for (sic) all federal employees be protected by the Merit System Protection Board and/or Office of Special Counsel states the statue or regulation gives jurisdiction over an reprisal allegation when prohibited personnel practice are involved by an agency. Although, the petitioner is a United States Post Office federal employee the Board states "The Board does not have jurisdiction over the independent federal agency (Post Office)", that is which the judgment of the court's

opinion for the rules of which they have written in 28 U.S.C., Part III Rule 14 of the Supreme Court of the United States. As such, the United States Court of Appeals for the Federal Circuit decision in dismissing the Petition's appeal to the Board for lack of jurisdiction (APPENDIX G), December 29, 1992, which contradicts fundamental principles of protection available to Federal employees whistleblowers from reprisal and prohibited personnel practices. Petitioner (federal) Postal Service employee, alleged that the agency had taken action against her in reprisal by doing prohibited personnel practices for whistleblowing activity, which has been a proven fact. Foremost, the reprisal of the United Postal Service has brought damages upon the petitioner. Along with the recognition of the facts by the Merit Systems Protection Board and/or the Special

Counsel et al., which did not assisted the petitioner as cited in 5 U.S.C. 1201, providing relevant information that is available to the petitioner under provisions of "Whistleblower Protection Act of 1989". Also, under provision 5 U.S.C. 1201, Section 2 of Pub. L. 101-12,.

SUMMARY OF THE ARGUMENT

The Petitioner has burden of proof that all of the justices has not been presented at the same time. However, the decisions and the opinions of the Court are important to my case. The petitioner is contending that the agency (United States Postal Service) has acted in reprisal for her having filed a whistleblower complaint. The petitioner, a Postal Service employee by the Federal Government, can appeal directly to the Board

alleged violations of 5 U.S.C. 2302(b)(8) under the IRA provisions of the Whistleblower Protection Act of 1989 and 29 U.S.C. Labor law to protect federal workers from appraisal when reporting prohibited personnel practices. 5 C.F.R. Part 1201.3 (19)(b). Accordingly, the court should study the Board's decision dismissing the petitioner's appeal rights as a Whistleblower.

ARGUMENT

THE PETITIONER 'S APPEAL RIGHTS HAS NOT BEEN RESPECTED FROM AN ALLEGATION OF REPRISAL FOR WHISTLEBLOWING ACTIVITY BECAUSE THE BOARD DID NOT GRANT REFERRAL TO THE SPECIAL PANEL AS A PROCEDURAL MATTER. As stated: 5 USC 1201

The range of the Court's review of decisions of the Board states to be limited, but the awareness that a law, rule or regulation having not been followed; or unsupported by substantial evidence of a mean for the proper legal group(s), Merit System

Protection Board and/or Special Counsel, and United States Postal Service. To make judgment of a settlement of justice that is due, as promised in 28 U.S.C and in Supreme Court Rule 42.2, whereas, the petitioner employee's right were violated for reporting prohibited personnel practices that lead to reprisal for whistleblowing activity.

CONCLUSION

For the reasons set out above, the petitioner must file a Petition for Writ of Certiorari in the Supreme Court of the United States. Accordingly, the Court should find that the petitioner's rights have been violated, due the law, rules, and regulations, which has promised to protect a whistleblower from prohibited personnel practices in reprisal for the petitioner's complaint, under the provisions of the Whistleblower Protection Act of 1989.

APPENDIX A

H-82-0365
CONTROL NUMBER

HOTLINE - WHISLTEBLOWER
COMPLAINT SUMMARY SHEET

A. COMPLAINT JO BOOKER
ADDRESS 9435 DALE GLADE,DALLAS TX 75217
PHONE (HOME) N/F (WORK N/F
EMPLOYER U.S. POSTAL SVC LOCATION DLS,TX
POSITION MAIL HANDLER
SS NO. 454-94-4414 CASE FILE NO.A16-36311

B. ALLEGATION (S):
COMPLAINT'S LETTER (SEE COPY ATTACHED) INDICATES SHE IS A FEDERAL EMPLOYEE WHO WAS INJURED ON THE JOB IN JULY 1980, BUT HAS NOT BEEN ABLE TO COLLECT FED EMPLOYEE'S COMPENSATION TO DATE

DATE: 11/25/81

SOURCE:
TELEPHONE - T
MAIL - M
IN-PERSON - P
OTHER - O

REC'D BY:

B.N. BERGER

ANONYMOUS - A
CITIZEN - C
EMPLOYEE - E
OF US POST SVC

CONFIDENTIALITY

U.S. DEPARTMENT OF LABOR

Office of Inspector General
Washington, D.C. 20210

Reply to the Attention of:
H/W Complaint
Desk - Room S-5512

DEC 15, 1981

MEMORANDUM FOR: ROBERT COLLYER

FROM: A. M. STATHAM, request by
Frances C. Kiley
Assistant Inspector General,
Investigators

SUBJECT; Hotline/Whistleblower
Complaint Number H-82-0365

Please initiate an appropriate inquiry into the allegations set forth in the attached complaint, and advise me by memo as to your finds and any corrective action taken within 120 days of the date of this memo. If you have any questions concerning this referral, please contact the OIC Complaint Desk Officer at FTS-357-0227.

ATTACHMENT

Pl. 95-452, Sec. 7, prohibits unwarranted disclosure of a complainant's identity and reprisals against employee complainants.

SEND ALL AMIL IN SEALED ENVELOPS "TO BE OPENED BY ADDRESSEE ONLY".

U.S. DEPARTMENT OF LABOR

Employment Standards Administration
Washington, D.C. 20210

Reply to the Attention of:

DEC 31, 1991

MEMORANDUM FOR: JOHN MCLELLAH
Director, Federal Employee's Compensation

FROM: HENRY C. GRONKIEWICZ, by CR
Director, Internal Control Unit

SUBJECT: Referrals from IG Hotline on Complaints on FECA Claims

We have received four referrals from the Inspector General on complaints by claimants of un processed FECA payments. The complaints ranged from failure to process compensation

claims by FECA for long periods of time since filing to unprocessed medical bills and reimbursements that are hurting claimants credit rating. We are transmitting the documentation to you for investigative action. Please advise us on the resolution of the complaints upon completion.

ATTACHMENTS

U.S. Department of Labor

Employment Standard Administration
Office of Workers' Compensation Programs
Washington, D.C. 20210

JAN 19, 1982

MEMORANDUM FOR: DEBORAH MILLES
Chief, Branch of
Hearings & Review

FROM: JOHN D. McLELLAN JR.
Associate Director for
Federal Employees'
Compensation

SUBJECT: Case of Jo Booker, A16-36311
OIG Hotline/Whistleblower
Complaint No. H-82-0365

Attached is a copy of subject complaint, received from the office of the Inspector

General. Please investigate the matter and furnish me with a full report within 60 days.

U.S. DEPARTMENT OF LABOR
Employment Standards Administration
Office of Workers' Compensation Programs
Washington, D.C. 20210

Date: MAR 15, 1982

Reply to
Attn of: ECFH

Subject: Jo Booker - A16-36311
OIG Hotline/Whistleblower Complaint No. H-82-0365

To: JOHN D. McLELLAN JR.
Associate Director for
Federal Employees' Compensation

The above named claimant requested a hearing before a representative of the Office on an adverse decision of the Dallas, Texas District Office dated 4/20/81. A hearing was held in Dallas, Texas on September 22, 1981. The Decision of the Hearing Representative finalized on 3/8/82, has been issued. That decision affirmed the prior decision of the

District Office.

The remainder of the issues raised by the claimant in her letter (H-82-0365) do not concern her status with the Office of Workers' Compensation Programs.

DEBRA L. MILLES
Chief, Branch of
Hearings and Review

APPENDIX B

DALLAS REGIONAL OFFICE

DOCKET NUMBER
DA34439110596

DATE: July 26, 1991

JO A. BOOKER,

Appellant,

v.

UNITED STATES POSTAL SERVICE,

Agency.

Jo A. Booker, Dallas, Texas pro se.

Darrell L. Jungman, Dallas, Texas for the agency.

BEFORE

Walter Orr
Administrative Judge

INITIAL DECISION

On June 26, 1991, Jo A. Booker appealed circumstances of her restoration to duty at the Bulk Mail Center, Dallas, Texas, on September 20, 1990.

The appeal is DISMISSED for lack of jurisdiction.

ANALYSIS AND FINDINGS

The appellant has the burden of proof to show that the Board has jurisdiction to consider her appeal.

The facts of this case are not in dispute. The appellant sustained a back injury in 1980 which prevented her from working. The U.S. Department of Labor awarded her worker's compensation benefits for her injury, and those benefits are still paid to the appellant. On or about September 20, 1990, the appellant returned to work at the agency on limited duty in a position modified to accommodate her medical condition. The appellant was dissatisfied with the circumstances of her return to duty, and she has appealed to the Board based on her complaints. Specifically, the appellant asserted that her pay was incorrectly computed, that leave was incorrectly restored, that her limited-duty position was not

appropriately modified to accommodate her condition, that she was not assigned to the tour she wanted to work, and that she wa not treated courteously by the agency's injury compensation specialist after her return to work. The appellant also indicated that she had filed discrimination complaints against the agency's injury compensation specialist, and that she had complained to the agency's inspector general about delays in completion of compensation claims. She alleges that she continues to have these and other problems because of reprisal for her complaints.

Under the provisions of 5 U.S.C. 7701(a), an employee or applicant for employment may appeal to the Board from any action subject to the Board's jurisdiction under any law, rule or regulation. The appellant has the burden of proof to show that the matter appealed is within the Board's jurisdiction. 5 C.F.R. 1201.56(a)(2)(i)

(1990).

The appellant has not been affected by an action appealable to the Board.

In this case the appellant has made a claim based on her entitlement to restoration under C.F.R. Par 353. The materials submitted by the appellant show that she is partially recovered from her injury and that she returned to work only in a limited capacity.

Under the provisions of Part 353, employees who fully or partially recover from compensable injuries have rights to appeal to the Board. For a restoration after partial recovery, the employee may only "appeal to MSPB for a determination of whether the agency is acting arbitrarily and capriciously in denying restoration." 5 C.F.R. 353.401(c) (1991). The appeal rights of a partially recovered employee exist only where there is a denial of restoration, and there is no right to appeal circumstances of a restoration

action which has been accomplished. See Mosher v. United States Postal Service, 32 M.S.P.R. 355 (1987).

The appellant is a partially recovered employee who has been restored to duty and who is attempting to appeal her restoration. If she has no right to appeal her restoration, the Board lacks jurisdiction to consider her appeal. By Order dated July 3, 1991, I informed the appellant that there was a question of the Board's jurisdiction in this case, and that she has the burden of proving that the Board has jurisdiction over her appeal. She was ordered to submit evidence and argument proving that the matters she sought to appeal were within the Board's jurisdiction. The appellant responded to this order on July 18, 1991, by submitting a package of documents in which she repeated her complaints about her restoration, and repeated her claims of discrimination and reprisal.

As indicated above, the Board lacks jurisdiction to consider the appropriateness of a restoration action under the provisions of 5 C.F.R. Part 353. The appellant has cited no other provision in law, rule, or regulation, and I find none, under which the Board can entertain her appeal. Accordingly, the appeal must be dismissed for lack of jurisdiction.

The appellant's claims of discrimination and reprisal do not establish a basis for the Board's jurisdiction.

The appellant alleged that the agency discriminated against her based on her physical handicap, and that she was subjected to reprisal for having complained to the agency's Inspector General. These allegations of prohibited personnel practices under 5 U.S.C. 2302(b)(1)(D) and (b)(9) are not, however, independent sources of appellate jurisdiction for the Board. The appellant

must first prove that she is entitled to appeal the underlying personnel action to the Board before the Board will consider such allegations. See Wren v Department of the Army, 2 M.S.P.R. 1, 2 (1980), aff'd sub nom. Wren v. Merit Systems Protection Board, 681 F.2d 867 (D.C. Cir 1982).

DECISION

The appeal is DISMISSED.

FOR THE BOARD:

Walter Orr
Administrative Judge

NOTICE TO APPELLANT

This initial decision will become final on August 30, 1991, unless a petition for review is filed by that date or the Board reopens the case on it own motion. This is an important date because it is the last day on which you can file a petition for review with the Board. The date on which eh initial

decision becomes final also controls when you can file a petition for review with the Court of Appeals for the Federal Circuit. The paragraphs that follow tell you how and when to file with the Board or the federal court. These instructions are important because if you wish to file a petition, you must file it within the proper time period.

BOARD REVIEW

You may request Board review of this initial decision by filing a petition for review. Your petition for review must state your objections to the initial decision, supported by references to applicable laws, regulations, and the record. You must file your petition with:

The Clerk of the Board
Merit Systems Protection Board
1120 Vermont Avenue, NW., Suite 802
Washington, D.C. 20419

Your petition must be postmarked or hand-delivered no later than the date this initial

decision becomes final. If you fail to provide a statement with your petition that you have either mailed or hand-delivered a copy of your petition to the agency, your petition will be rejected and returned to you.

JUDICIAL REVIEW

If you are dissatisfied wit the Board's final decision, you may file a petition with:

The United States Court of Appeals
for the Federal Circuit
717 Madison Place, NW.
Washington, D.C. 20429

You may not file your petition with the court before this decision becomes final. To be timely, your petition must be received by the court no later than thirty calendar days after the date this initial decision becomes final.

NOTICE TO AGENCY/INTERVENOR

The agency or intervenor may file a petition for review of this initial decision in accordance with the Board's regulations.

CERTIFICATE OF SERVICE

I hereby certify that the Brief of the Respondent was sent by regular mail this the 24th day of August 1992, to each of the following:

Jo A. Booker
9435 Dale Glade
Dallas, Tx 75217-2542

David Cohen, Esquire, Director
Commercial Litigation Branch
Civil Division
U.S. Department of Justice
Washington, D.C. 20530
Attn: Second Floor Classification Unit

James W. Poirier, Esquire
U.S. Department of Justice
550 11th Street, NW., Room 9030
Washington, D.C. 20530

Bettye D. Steve
Legal Technician

APPENDIX C

THE CLERK OF THE BOARD
MERIT SYSTEMS PROTECTION BOAR
1120 VERMONT AVENUE, NW., SUITE 802
WASHINGTON, D.C. 20419-9998

JO A. BOOKER

Appellant,

Docket No.
DA34439110596

v.

UNITED STATES POSTAL SERVICE

Agency.

Date:
August 20, 1991

Jo A. Booker, Dallas, Texas, pro se.

Darrell L. Jungman, Dallas, Texas, for the agency.

PETITION FOR REVIEW

COMES NOW, JO A. BOOKER, the appellant, petition for review before the Board, whereof, the stated objections to the initial decision, supported by references to applicable law, rule or regulations, whereas, the agency has failed to respond to the allegations, and the record as follows:

I.

Pursuant to 5 USC 2302 (b)(9) and 5 CFR

300.104 (a), the appellant has the burden of proof as to the issues of jurisdictions and appeal rights.

II.

In accordance with the listed law, rule or regulation the reprisal appellant has been subjected to for having complained to the agency's Inspector General has given reasonably believes for the agency's prohibited personnel practices. The agency altered the September 22, 1990, agreement Form PS 50, whereas upon reemployment the appellant was place in the same craft, but a permanent modified job status, opposed to the FECA 5 USC 8151 and OPM Regulations 5 CFR 353, in accordance that states "Upon reemployment a position in a different bargaining unit or craft necessary because of medical accommodation." The prohibited personnel practices toward this regulation caused additional medical problems with a delay to

vocational assistance in adjusting to the return to the work place. In accordance to 5 USC 2302 (b)(8)(A), the first subpart protects "a disclosure of information by an employee or applicant, which the employee or applicant reasonably believes evidence a violation of law, rule, or regulation or mismanagement, a substantial and specific danger to my health and safety..." In additional to the listed prohibited personnel practices my compensation payments were delayed after my reemployment status, while I attended a work hardening program to strengthen the injure to perform the modified Mail Handler job. The agency's compensation specialist (Darla Farris-Love), repeatedly insisted for me to return to the previous employer, Dallas Police Department as an operator. The compensation specialist stated she supports her thoughts because, "You hate the Post Office." In support my position, note the following:

I. Issue 1, are four documents that were entered into my OWCP files, document #1, dated November 25, 1981, Control Number H-82-0365, is the Complaint Summary sheet that was forwarded from another Federal agency concerning my original complain regarding the status of my on the job injury non compensation payments. Document #2, dated December 15, 1981, states, "Pl 95-454, sec 7 prohibits unwarranted disclosure of a complaint's identity and reprisals against employee complaints." Documents #3, dated December 31, 1981, indicates my referral from the Inspector General in complaints by claimants of unprocessed FECA payments to unprocessed medical bills and reimbursements. These acts were at that Documents #4, dated January 9, 1982, Chief of Brand of Hearing and Review Deborah Milles was requesting the matter be investigated and to furnish a full

report to her at a later date.

II. Issue 2 are the two different appellant's Form PS 50, Notification of Personnel Action, Document #1, reemployment, stating the appellant is a Mail Handler "to be reemployed to a position in a different bargaining unit or craft necessary, because of medial accommodation. Credited with prior federal/military service. 558 Reemployment under FECA, 5 USC 8151, and OPM Regulations, 5CFR 353, accepted a permanent modified job." Document #2 states, "The PDC will process any necessary salary and/or leave adjustment." This document went into effect September 25, 1990, but was not enforced.

III. Issue 3 are documentation supporting my allegations of several different prohibited personnel practices taken toward my medical disability status. Document #1, is a buck slip submitted by the Director Support USPS,

Jimmie D. Lamb, after I inform him of my complications in attempting to work the schedule on late nights and had requested a tour change. The bulk slip had handwritten remarks on it of information needed form my physician to support my tour change. Document #2, dated January 30, 1991, from Dr. Tom G. Mayer requested the tour change "as soon as possible," because of my long period of disability complications. The agency did not respond to the medical letter until May 30, 1991, after I went back to the compensation office with a third plea for the tour change. Document #3 is a handwritten bulk slip submitted by me on May 30, 1991, requesting a response to the request. Document #4, is a letter, dated May 30, 1991 from compensation Specialist Darla Farris-Love, after I had handwritten my response note. Ms. Love had the letter typed by the secretary as I sat in

her office. Document #5 is a letter dated May 31, 1991. The letter was hand delivered to me on June, 1991, during a brief meeting, requested by Ms. Love. The letter was signed by manager Robert Cokes, advising the tour change to Tour II effective date as of June 15, 1991. Reporting schedule will be 0600 to 1450, with non scheduled days to be on Tuesday and Wednesday." After, I questioned the days off changing from Saturday/Sunday to Tuesday/Wednesday, I was informed that Tour Superintendent Robert Woodruff, who ordered my termination in March, 1980 and was a party in my past EEO complaint, stated I had no seniority. Therefore, I could not have any other days off except Tuesday/Wednesday, Documents #6, #7, #8, and #9 are <u>EMPLOYEE WORK SCHEDULES</u> for appellant's reporting area, these documents indicates, while on Tour I my seniority, although, I was given the seniority

number of 132 later, note that there are several person under my seniority number but are scheduled with friday and saturday or either sunday and monday days off with lesser seniority than myself.

APPENDIX D

PUBLISHER'S NOTE :

ORIGINAL PAGINATION IS NOT CONTINUOUS.

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

DOCKET NUMBER: 92-3402
DATE: June 20, 1992

Jo A. Booker,	)
Appellant,	)
v.	)
UNITED STATES POSTAL SERVICE,	)
Respondent.	)

JO A. BOOKER, DALLAS, TX, pro se.

JAMES W. POIRER, WASHINGTON, D.C., for the respondent.
DAVID M. COHEN, WASHINGTON, D.C., for the respondent.
MARY MITCHELSON, WASHINGTON, D.C., for the respondent.

REQUEST FOR APPEAL

I, Jo A. Booker, appellant and files this request for appeal an appropriate pleading in the above-entitled matter. As grounds for this request, this appellant has the burden of

proof as to the issues of jurisdiction and appeal rights.

The appellant respectfully states that it is in the best interest of justice that both appellant and the respondent be afforded the written position of the appellant in this matter.

WHEREFORE, the appellant respectfully requests a appeal for the appropriate plead.

Respectfully submitted,

Jo A. Booker
Appellant
9435 Dale Glade Drive
Dallas, TX 75217-2542

CERTIFICATE OF SERVICE

I certify that the attached documents were sent by regular mail this day to the following:

James W. Poirier, Counsel for Respondent
U.S. Department of Justice
550 11th Street, NW., Room 9132
Washington, D.C. 20530

David M. Cohen, Counsel for Respondent
U.S. Department of Justice
550 11th Street, NW., Room 9030
Washington, D.C. 20530

Mary Mitchelson, Counsel for Respondent
U.S. Department of Justice
550 11th Street, NW., Room 9026
Washington, D.C. 20530

Date: 06/20/92

Jo A Booker, appellant

ATTACHMENTS

APPENDIX E

September 10, 1992

United States Department of Labor
Office of Inspector General
200 Constitution Avenue
Washington, D.C. 20210

Subject: Case of Jo A. Booker, A16-36311
OIG Hotline/Whistleblower
Complaint No. H-82-0365

Dear Hotline/Whistleblower Complaint Desk:

Please forward this letter to the proper person.

In regards to the above subject, I was reinstated approximately nine years later to my previous employer after being terminated for excessive absenteeism. I worked as a Dallas Police Operator for eight years until I was reemployed by the agency.

During a meeting with the agency's compensation specialist (and my mother), I was confronted defensively about the complaint letters filed to the Department of Labor regarding the prohibited personnel practices,

which lead to my termination, effective Apr 28, 1981. The reprisal acts continued duri my attempt to return to the agency (Dalla Bulk Mail Center) in a permanent injured mai handler status, opposed to the PS Form 50 Notification of Personnel Action, which states "reemployed to a position in a different bargaining unit or craft necessitated because of medical accommodation." "Reemployed under FECA, 5 USC 8151, and OPM regulations, 5 CFR 353." The agency's management, union and EEOC, ignored my complaints or did not investigate my complaints, which did allow the compensation specialist to continue her reprisal acts. Not only did the prohibited personnel practices come from the specialist but from other management also. The agency's management continued to ignore my medical condition (medical requests from physicians and my request) to release the tension added to my attempt to return to the agency but to

no avail.

I am currently on the OWCP roles and is receiving physiotherapeutic and medical treatments regarding my on the job injuries.

I have complain to the U.S. Merit Systems Protection Board, which is the wrong agency for jurisdiction over the action the Postal Service has taken. I was not aware of this information until August 24,1992, that each agency has it's own inspector general and my complaint No. H-82-0365 was investigated under the U.S. Department of Labor. Therefore, I am forwarding the complete complaint files that has been submitted to the U.S. Merit Board, the agency's (Dallas Bulk Mail Center) union, and EEOC, also their correspondence.

I would appreciate assistance in this matter.

Respectfully submitted,

Jo A. Booker
9435 Dale Glade Drive
Dallas, TX 75217-2542

BEST AVAILABLE COPY

U.S. OFFICE OF SPECIAL COUNSEL
1730 M Street, N.W., Suite 300
Washington, D.C. 20036-4505

November 10,1992

Ms. Jo A. Booker
9435 Dale Glade Drive
Dallas, TX 75217-2542

Re: OSC File No. MA-93-0092

Dear Ms. Booker:

This letter refers to your complaint to the Office of Special Counsel which was referred to us by the Department of Labor, Inspector General Office. You allege a prohibited personnel practice at the United States Postal Service.

The Office of Special Counsel is authorized by the Civil Service Reform Act to investigate allegation of prohibited personnel practices and activities prohibited by civil service law, rule or regulation. 5 U.S.C. 1214(a)(1)(A), 1216(a) and 2302(b). However, the provisions of title 5, United States Code,

with certain exceptions not applicable here, do not apply to the U.S. Postal Service, 39 U.S.C. 410. Therefore, we have no authority to investigate allegations of prohibited personnel practices in the Postal Service.

Accordingly, we plan no action with respect to your complaint and we have closed our file in this matter. However this letter should not be construed as an adjudication of any matter you may have pending or plan to file in any administrative appeal.

Sincerely,

Ralph B. Eddy
Assistant Special Counsel
Complaints Examining Unit

RBE/mlm

APPENDIX F

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

_____ v _____

No. 92-3402

Informal Brief of Petitioner

Read the Guide for Pro Se Petitioners and Appellant before completing this form. Attach a copy of the initial decision of the administrative judge and the decision, if any, of the Merit Systems Protection Board (MSPB) or a copy of the Arbitrator's decision. Answer the following questions as best you can. Your answers should refer to the MSPB decisions or the Arbitrator's decision where possible. Use extra sheets if needed.

1. Has the petitioner ever had another case in this court? No In a United States District Court? No In the Equal Employment Opportunity Commission? No If so, identify each case.

each case.

2. Did the MSPB or the Arbitrator incorrectly decide or fail to take into account any facts? Yes If so, what facts? (Refer to paragraph 7 of the Guide.)

The fact that in accordance with law, rules, regulations the reprisal acts the agency (United States Postal Service) has subjected the appellant for having complained to he agency's inspector general. The first subpart in accordance to 5 U.S.C. 2302 (b)(8)(A), 5 C.F.R. Part 1201.3 (19)(b), indicates the Board (MSPB) has jurisdiction to hear appellant's affirmative defense of the agency's actions.

3. Did the MSPB or the Arbitrator apply the wrong law? _____ If so, What law should be

applied?

4. Did the MSPB or the Arbitrator fail to consider important grounds for relief? Yes If so, what grounds?

The grounds that the Board (MSPB) does have jurisdiction over reviewing the reprisal actions taken toward a federal employee under the "Whistleblower Act of 1989" protection law after the agency was investigated by the agency's Inspector General.

5. Are there other reasons why the MSPB's or the Arbitrator's decision was wrong? Yes If so, what reasons?

The MSPB's decision was based on several prohibited personnel practices before the retaliation acts occurred. My reemployment did not occur until September 22, 1990, which is then when I was confronted verbally by the agency's (United States Postal Service)

compensation specialist regarding my appeal allegations. My allegations to the MSPB (Merit Systems Protection Board) alleges retaliations after a lengthy investigation done by the agency's Inspector General, which stated the whistleblower would be protected under the "Whistleblower Act". The prohibited personnel practices was alleged to the agency's Inspector General not the Merit Systems Protection Board.

6. **What action (relief) do you want the court to take in this case?**

It would be conducive for the court or Board (MSPB) to follow-up a review in the appellant reprisal allegations and the law, rules, regulation violated enforced.

7. **Do you want to argue before the court in person? _____ What are the reasons why**

argument will aid the court? (Refer to paragraph 15 of the Guide.)

If my presence is necessary, Yes.

05/20/92
Date

Petitioner's signature
(Notary not required)

Mail an original and three copies of the informal brief and attachments to:

Clerk
U.S. Court of Appeals
for the Federal Circuit
717 Madison Place, NW.
Washington, D.C. 20439

Serve a copy of the informal brief and attachments by mail on the respondent's attorney using the name and address on the notice of appearance form (noting thereon the date you served the respondent) to the original of your brief as your proof of service.

APPENDIX G

United States Court of Appeals for the Federal Circuit

92-3402

JO A. BOOKER,

Petitioner,

v.

MERIT SYSTEMS PROTECTION BOARD,

Respondent.

DECIDED: December 29, 1992

Before MAYER, CLEVENGER and SCHALL, Circuit Judges. MAYER, Circuit Judges.

Jo A. Booker petitions for review of the decision of the Merit Systems Protection Board in Docket No. DA34439110596, dated April 6, 1992, dismissing the appeal of the circumstances of her restoration to duty with the United States Postal Service for lack of jurisdiction. We affirm.

Background

Booker sustained a back injury in 1980 which prevented her from continuing her duties at the Bulk Mail Center of the United States Postal Service in Dallas, Texas. The United States Department of labor awarded her worker's compensation benefits for the injury. By about September 20, 1990, Booker had made a partial having complained to the inspector general may be pursued before the board in an individual right of action (IRA) appeal under the Whistleblower Protection Act, 5 U.S.C. 1221, (Supp. III 1991) if the complaint to the inspector general constitutes a disclosure under 5 U.S.C. 2302 (b)(8) (Supp. III 1991). See Whistleblower Protection Act of 1989, Pub. L. No. 101-12, 103 Stat. 16 (codified in various sections of 5 U.S.C.); Ward v. Merit Systems Protection Board, No. 92-3154, slip op. at 3 (Fed. Cir. December 4, 1992). The board held that it need not determine if thee

complains were protected disclosures under section 2302 (b)(8), however, because Postal Service employees could not appeal alleged whistleblower violations directly to the board under the IRA provisions. Those employee amy raise whistleblowing only as a defense in an otherwise appealable actions. Because there was no otherwise appealable action in this case, the board held it was without jurisdiction.

Discussion

The facts are not in dispute; the only issue in this appeal is whether the board properly interpreted in applicable law and regulations in determining it lacked jurisdiction. Booker sought review of the circumstances of her restoration to duty with the Postal Service. It was agreed that she had partially recovered from a compensable injury, and restoration to duty from a

compensable injury is provided for by 5 C.F.R. Part 353 (1988). Appeals based on the right to restoration may be had at the Merit Systems Protection Board under 5 C.F.R. 353.401 which provides in part:

> (a) Except as provided below, an employee or part may appeal to the MSPB an agency's failure to restore or improper restoration . . . .
>
> (c) An Individual who is partially recovered from a compensable injury may appeal to MSPB for a determination of whether the agency is acting arbitrarily and capriciously in denying restoration. [Emphasis added].

The regulation is straightforward. An employee in Booker's position, having been restored to duty after a partial recovery, may not appeal the details or circumstances of her restoration for a determination of whether it was arbitrary or capricious. Because her

restoration was not denied, but has been accomplished, the board was correct that it lacked jurisdiction to respond to Booker's complaints about the particulars of her restoration.

Booker's further allegations that Postal Service employees committed prohibited personnel practices in violation of 5 U.S.C. 2302 (b)(1)(D) and (b)(9) by discriminating against petitioner because of the on the job injuries and in reprisal for complaints to the inspector general are also beyond the board's jurisdiction. As a federal, Postal Service employee, Booker could not seek corrective action from the board under 5 U.S.C. 1221.

Section 1221(a) allows an employee to bring an IRA seeking corrective action from the board with respect to any "personnel action" that results from a "prohibited personnel practice" taken in retaliation for whistleblowing. According to section 2302, a

section 2302, a "personnel action" may be considered a "prohibited personnel practice" only is it occurs within an "agency" as that word is defined. The definition of "agency" in Section 2302(a)(2)(C) does not include the United States Postal Service, which is specifically excluded from the generally applicable definition of "executive agency" in 5 U.S.C. 105 (1988), by virtue of its exclusion from the definition of "independent establishment" in 5 U.S.C. 104 (1988). It is a unique entity. Where Congress intended the Postal Service to be included within the definition of "agency" or to be subject to particular provisions of Title 5, it explicitly so provided. See, e.g., 5 U.S.C. 3371(3), 4103 note, 5514(a)(4)(B), and 5520(c)(4) (1988). Its absence from the section 2302 definition could only have been intentional in light of this congressional practice. Cf. United States Department of

APPENDIX H

UNITED STATES COURT OF APPEALS for the
FEDERAL CIRCUIT

92-3402

JO A. BOOKER

Petitioner,

v.

MERIT SYSTEMS PROTECTION BOARD,

Respondent.

JUDGEMENT

ON APPEAL from the MERIT SYSTEMS PROTECTION BOARD

in CASE NO(S). DA34439110596;DA3443910596I-1

This CAUSE having been heard and considered, it is ORDERED AND ADJUDGED:

AFFIRMED

ENTERED BY ORDER OF THE COURT

DATED _____ _____

Francis X. Gindhart,Clerk

ISSUED AS A MANDATE: January 19, 1993

JO A. BOOKER
Petitioner Pro Se
9435 DALE GLADE DRIVE
DALLAS, TEXAS 75217-2542
Telephone: 214-309-0095

March 29, 1992

VIA FEDERAL EXPRESS

Mr. William K. Suter, Clerk
Supreme Court of the United States
Office of the Clerk
Washington, D.C. 20543

Re: Jo A. Booker, Pro Se v. United States Merit System Protection Board, et al.
Case No's. DA34439110596; DA3443910596I-1

Dear Mr. Suter:

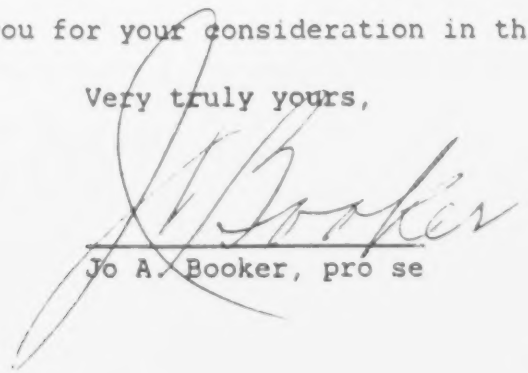
Jo A. Booker, Petitioner pro se represent the above-captioned matter. I have recently received the Board's Petition for Affirmed Judgement for dismissing the appeal of the circumstances of reprisal that lead to prohibited personnel practices by the United States Postal Service for lack of jurisdiction.

I respectfully request that the Court grant me an opportunity to oppose the Motion

for Review, to respond to all matters raised in the Petition pro se for Reviewing and Suggestion of Appropriateness of Review U.S. Merit Systems Protection Board, as well as to review the standing of the Board and/or Office of Special Counsel for review in this matter.

Thank you for your consideration in this regard.

Very truly yours,



Jo A. Booker, pro se

jab

cc: Solicitor General